

Original

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	FCC 02-201
)	
Amendment of Section 73.202(b),)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations)	RM-9027
(Anniston and Ashland, AL, College Park,)	RM-9268
Covington, and Milledgeville, Georgia))	RM-9384

To: The Commission

**NOTICE OF NO RESPONSE RECEIVED TO THIRD AND
FOURTH MOTIONS FOR LEAVE TO FILE SUPPLEMENT
AND
REQUEST FOR ENTRY OF ADVERSE FINDINGS AGAINST WNNX LICO, INC.**

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January 2, 2003

Preston W. Small (Mr. Small), by his attorney, hereby serves notice that neither he nor his counsel has received any response or opposition to Mr. Small's December 4, 2002 *Third Motion for Leave to File Supplement* nor to Mr. Small's December 13, 2002 *Fourth Motion for Leave to File Supplement*. In support whereof, the following is respectfully submitted:

1) The *Third Motion for Leave to File Supplement* seeks to provide information that WNNX and its counsel have made repeated threats in their FCC filings of bringing a libel action against Mr. Small for because, *inter alia*, Mr. Small has alleged that WNNX has misrepresented facts. The *Third Motion* notes that the Commission does not adjudicate libel claims and that the purpose of the several libel threats, therefore, is to intimidate Mr. Small into withdrawing from the instant proceeding. The information in the *Third Motion* is presented in the context of impeaching WNNX's counsel's claim that "WNNX states unequivocally that it is not a party to or authorized any threats against Mr. Small." WNNX's November 8, 2002 *Consolidated Opposition*, ¶¶ 6-7. WNNX and its counsel have made repeated threats of civil litigation against Mr. Small and the statement in WNNX's November 8, 2002 *Consolidated Opposition* is completely false and misleading.

2) The *Fourth Motion* presents the FCC with a copy of the Federal District Court's November 26, 2002 *Order* denying Bridge Capital Investors' and WNNX's request for a preliminary injunction against Mr. Small which sought to force Mr. Small to withdraw from the instant proceeding. The *Fourth Motion* states that based upon the findings entered by the court, the suit appears to have been frivolously tiled against Mr. Small. The *Fourth Motion* also notes the judge's finding that "on April 30, 1997 Plaintiff and Susquehanna [WNNX] filed a petition for reconsideration with the FCC in which they contended that Scotts Trail Radio's filings constituted

a ‘blatant violation’ of the Small Agreement that triggered a civil action for specific performance and damages.” *Fourth Morion*, ¶9, citing *Order*, at 20 & 16. Thus, not only have WNNX and its counsel made repeated threats of civil liability against Mr. Small in an effort to deter him from presenting information to the Commission, WNNX and its counsel made the very same threat of civil litigation, on the very same frivolous grounds, against Mr. Small in Spring 1997 which Bridge Capital Investors made against Mr. Small in Spring 2002. WNNX’s November 8, 2002 “unequivocal” denial to the Commission of ever having threatened Mr. Small with civil liability if he presented information to the Commission is shown to be completely false with reference to a finding made by a Federal District Judge and WNNX and its counsel have made false and misleading statements in this proceeding in an effort to deflect the allegations of improper tampering made in Mr. Small’s *Petition for Reconsideration*.

3) Commission decisions in rulemaking proceedings must be made upon upon record evidence and cannot be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Because there is no conflicting information available, the Commission must accept as true Mr. Small’s allegations unless there is other record evidence which contradicts Mr. Small’s factual assertions. Mr. Small has shown that WNNX and its counsel have made repeated threats of retaliatory civil litigation against Mr. Small which threats were intended to deter Mr. Small from presenting information to the Commission, Moreover, Mr. Small has shown that WNNX and its counsel made a serious false statement to the Commission when WNNX’s counsel “unequivocally” denied ever having threatened Mr. Small.

4) Pursuant to *Asfroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. 1988) the Commission is required to determine 1) assuming the factual allegations are true, would grant of

WNNX's rulemaking petition be *prima facie* inconsistent with the public interest; and 2) whether there is a substantial and material question of fact requiring resolution in a hearing. If it is determined that WNNX or its counsel have made material misrepresentations to the Commission, or abused the Commission's processes through the making of threats of civil liability, then the Commission must disqualify WNNX from the proceeding.

5) The *Astroline* analysis for the misrepresentation allegation: First Prong—Whether grant of WNNX's rulemaking petition in the instant case is *prima facie* inconsistent with the public interest assuming that the allegations of misrepresentation asserted against WNNX are true. The Commission views misrepresentation to be a disqualifying factor. Recently the Commissioners stated

we consider misrepresentation to be a serious violation, as our entire regulatory scheme “rests upon the assumption that applicants will supply [the Commission] with accurate information.” For this reason, applicants before the Commission are held to a high standard of candor and forthrightness.

SBC Communications, Inc., 24 CR 1225 ¶ 66 (FCC 2001) citing *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210, ¶ 58 (1986) (internal footnotes omitted). The Commissioners continued that

The integrity of the Commission's processes cannot be maintained without honest dealing by regulated companies. Regardless of the factual circumstances of each case, misrepresentation to the Commission is always an egregious violation. The Commission may treat even the most insignificant misrepresentation as an event disqualifying a licensee from further consideration.

SBC Communications, Inc., 24 CR 1225 n. 84 (FCC 2001) (internal quotation marks and citations omitted), Accordingly, because Mr. Small has alleged that WNNX and its counsel have made false statements to the Commission, and because those allegations must be accepted as true, and because

the Commission has determined that the making of false statements is disqualifying, Mr. Small has established a *prima facie* case that grant of WNNX's rulemaking petition is inconsistent with the public interest.

6) The *Astroline* analysis for the misrepresentation allegation: second prong-Whether there is a substantial and material question of fact requiring resolution in a hearing. Mr. Small's factual allegations that WNNX and its counsel have made various statements to the Commission which constitute material misrepresentation is uncontradicted in the record. Because nothing in the record of this proceeding which contradicts Mr. Small's factual allegations, the Commission must conclude that WNNX and its counsel made such misrepresentation. Because there is no material question of fact regarding this issue, because there is no contradictory record evidence, there is no requirement for a hearing on this matter and WNNX must be disqualified forthwith and its rulemaking petition dismissed.

7) The *Astroline* analysis for the illegal threats allegation: First Prong-Whether grant of WNNX's rulemaking petition in the instant case is *prima facie* inconsistent with the public interest assuming that the allegations of threats asserted against Mr. Small by WNNX are true. It has long been Commission policy that it is a serious abuse of process to make threats to file a civil suit for the purpose of preventing the filing of information with the Commission. *See Patrick Henry*, 69 F.C.C.2d 1305, 1314 ¶ 18 (FCC 1978). In *Patrick Henry* the Commission designated a renewal applicant for hearing to determine, *inter alia*, whether the applicant abused the Commission's processes "by attempting to coerce petitioners to deny by the threat, or actual filing, of retaliatory civil actions against petitioner." *See also Kaye Smith Enterprises*, 98 F.C.C.2d 675 ¶16 (Rev. Bd. 1984) ("intimidation or harassment of witnesses requires threats of reprisals or some other

unnecessary and abusive conduct reasonably calculated to dissuade a witness from continuing his or her involvement in a proceeding.”); *Harvit Broadcasting Corp.*, 35 F.C.C.2d 94 (Rev. Bd. 1972) (“charges of attempted inducement, enticement, coercion, or other improper influence on Commission witnesses raise a serious and substantial public interest question.”); *Chronicle Broadcasting Co.*, 19 F.C.C.2d 240 ¶ 9 (Rev. Bd. 1969), *rev. denied*, 23 FCC 2d 162 (FCC 1970) (participation in a Commission proceeding does not open one up to “attempts to harass, intimidate, and coerce them to discontinue their involvement in the proceeding” by way of direct threat of “reprisal for his involvement in a Commission proceeding”). Abuse of process is a disqualifying offense. *GACO Communications Corporation*, 94 F.C.C.2d 761 n. 71 (Rev. Bd. 1983). Accordingly, because Mr. Small has alleged that WNNX and its counsel have made threats against Mr. Small which threats were intended to prevent Mr. Small from presenting information to the Commission, and because those allegations must be accepted as true, and because the Commission has determined that the making of such threats is a serious and disqualifying abuse of the Commission’s processes, Mr. Small has established a *prima facie* case that grant of WNNX’s rulemaking petition is inconsistent with the public interest.

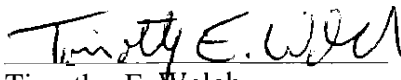
8) The *Astroline* analysis for the illegal threats allegation: Second Prong—Whether there is a substantial and material question of fact requiring resolution in a hearing. Mr. Small’s factual allegation that WNNX and its counsel have made various libel threats against Mr. Small, and Mr. Small’s factual allegation that a federal district court judge found that WNNX threatened Mr. Small with civil liability in 1997 concerning the subject matter of the suit which was filed against Mr. Small in August 2002, are uncontradicted. Because nothing in the record of this proceeding contradicts Mr. Small’s factual allegations, the Commission must conclude that WNNX’s threats

of civil litigation were intended to dissuade Mr. Small from presenting information to the Commission and that such threats constitute a serious, disqualifying abuse of the Commission's processes. Because there is no material question of fact regarding this issue, because there is no contradictory record evidence, there is no requirement for a hearing on this matter and WNNX must be disqualified forthwith and its rulemaking petition dismissed.

WHEREFORE, in view of the information presented herein and in earlier pleadings, it is respectfully requested that the Commission enter adverse findings against WNNX on the misrepresentation and abuse of process issues, disqualify WNNX from the instant proceeding, dismiss WNNX's petition for rulemaking, and grant Mr. Small's petition for rulemaking.

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January 2, 2003

Respectfully submitted,
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His Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of January 200 served a copy of the foregoing NOTICE OF NO RESPONSE RECEIVED TO THIRD AND FOURTH MOTIONS FOR LEAVE TO FILE SUPPLEMENT AND REQUEST FOR ENTRY OF ADVERSE FINDINGS AGAINST WNNX LICO, INC. by First-class United States mail, postage prepaid, upon the following:

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